In The United States Court of Federal Claims

No. 00-447 C
(Filed: August 11, 2003)

STEPHEN S. ADAMS, *et al.*,

Plaintiffs,

Fair Labor Standards Act; Overtime pay; Fifth Amendment Takings; Cognizable property right

v.

THE UNITED STATES,

Defendant.

Jules Bernstein, Bernstein & Lipsett, 1920 L Street, N.W., Suite 602, Washington, DC, for plaintiffs.

Shalom Brilliant, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

Block, *Judge*.

To James Madison, rightly termed the Father of the Constitution, "[t]hat alone is a *just* government which impartially secures to every man whatever is his *own*." [1] What must be secured by government is personal security and private property, the protection of which was considered by the Founders of our Republic to be the centerpiece of civil society and the source of all other liberties. Although originally opposed to a Bill of Rights, it was Mr. Madison who ultimately penned and fought for its ratification. The Fifth Amendment to our Constitution was in part adopted to protect private property from arbitrary governmental action.

Two clauses of this amendment are pertinent in this case. First, the Due Process Clause, which protects, "life, liberty, or property" from being seized without "due process of law." Second, the Takings Clause, which proscribes the taking of private property "for public use" without "just compensation." The District Court for the District of Columbia and the D.C. Circuit have already opined as to the applicability of the first clause. This court is asked to do the same for the latter.

[1] James Madison, *Essay on Property*, reprinted in Kurland, *The Founders' Constitution*, Vol. 1, Ch. 16 Document 23, University of Chicago Press (1987) (emphasis original).

More succinctly, this case revolves around the interplay between the Takings Clause and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (1994) (FLSA), which in part mandates the payment of "overtime" wages beyond the set rate of pay. Plaintiffs bring suit on the claim that the Takings Clause was violated by a congressional amendment to the FLSA's statute of limitations, which was applied to them retroactively and denied them their alleged entitlement to overtime compensation. Defendant moves to dismiss this claim on grounds of either a lack of subject matter jurisdiction or because it fails to state a claim upon which relief may be granted.

The central issue facing the court is whether the statutorily mandated overtime pay falls within the meaning of "property" under the Fifth Amendment's Takings Clause. A collateral issue is whether the nullification by Congress of plaintiffs' FLSA overtime payments amounts to a unconstitutional taking of a "cause-of-action" to sue to protect property or a right recognized by law. For the reasons set forth below, the court finds plaintiffs possess no property right cognizable under the Takings Clause of the Fifth Amendment, and therefore, the defendant's motion to dismiss must be granted.

I. Facts

The facts, unless otherwise noted, are undisputed and are drawn from the complaint, defendant's motion to dismiss, plaintiffs' motion in opposition, and the appendices attached thereto.

This case is brought on behalf of nearly 14,000 employees of the Bureau of Alcohol Tobacco and Firearms (ATF), Drug Enforcement Agency (DEA), Internal Revenue Service (IRS), United States Customs Service (USCS), and United States Secret Service (USSS). Each plaintiff seeks over $10,000 in FLSA overtime back pay from the United States government.

Claims for back pay brought under the FLSA are governed by the Portal-to-Portal Act which establishes a two year statute of limitations for non-willful violations, and a three year statute of limitations for willful ones. 29 U.S.C. § 255(a) (2000). The importance of the statutory limitations period is significant in back pay cases such as this because the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause-of-action accrues each payday. Thus, a six year statute of limitations means that an employee could recover six years of back pay or overtime compensation from the date of filing; whereas, a two year statute would limit recovery to only two years worth of such compensation. *See Adams v. Hinchman*, 154 F.3d 420, 422 (D.C. Cir. 1998). It thus is this difference in potential recovery that is at issue in this case.

In 1978, the General Accounting Office (GAO) issued *In re Transportation Systems Center*, 57 Comp. Gen. 441 (1978). The *In re Transportation Systems Center* opinion altered the statute of limitations period for claims brought before an administrative agency, as opposed to ones brought before the courts of law. The Comptroller General reasoned that the language of the Portal-to-Portal Act limited its applicability to "actions at law" which meant the Act only applied to those actions brought before the courts, rather than those brought before an administrative agency. *Id*. As a result, back pay cases under the FLSA brought before the GAO were governed by the Barring Act's six year statute of limitations (31 U.S.C. § 3702(b) (2002)), while FLSA back pay cases brought to the courts

were still governed by the FLSA's two or three year limitations period (29 U.S.C. § 255(a) (2002)).

Such was the state of affairs between 1990 and 1995 when plaintiffs simultaneously filed both administrative claims, and claims in this court for the FLSA overtime back pay allegedly owed them. *Adams v. United States*, 27 Fed. Cl. 5 (1992).[2] Due to the simultaneous pendency of both types of claims, the GAO stayed the administrative claims pending the outcome of the claims in the this court. During the time of the stay, however, the Comptroller General issued another opinion, *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994) ("*Ford* decision"), instructing the GAO to apply the two or three year statute of limitations to all FLSA administrative claims. This change time barred many of plaintiffs' claims. As a result, plaintiff wrote to the Comptroller General urging him to reverse the *Ford* opinion or, at least, not apply it to plaintiffs. The Comptroller General allegedly did not respond.

A month after plaintiffs' missive was mailed to the GAO, Congress effectively reversed in part the Comptroller General's *Ford* decision with passage of section 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub. L. No. 103-329, 108 Stat. 2383, 2432 (1995). Section 640 mandated a six year statute of limitations for administrative claims filed *prior* to June 30, 1994, but a two year statute of limitations remained for claims filed *after* June 30, 1994.[3] Since the Comptroller General's decision applied retroactively, the claims of nearly 3,000 plaintiffs who fell into this latter category became time barred.

Plaintiffs then wrote to the GAO requesting a meeting to discuss the effect of section 640 on the resolution of plaintiffs' claims. The GAO responded by acknowledging that section 640 modified the *Ford* decision, but instructed the plaintiffs to exhaust their administrative claims before the particular agency (the ATF or the DEA, for example) before commencing an action before the GAO. Plaintiffs reluctantly agreed and took their claims to the ATF, DEA, IRS, USCS and the USSS. On January 27th, 1995, Stephen J McHale, attorney for the Department of Treasury (the parent agency of the ATF, DEA, IRS, USCS, and USSS), responded to plaintiffs stating that section 640 was clear and therefore plaintiffs' claims filed after June 30, 1994 were time barred. Plaintiffs thereafter received letters from each individual agency reiterating Mr. McHale's decision.

Having obtained adverse decisions from the individual agencies, plaintiffs sought review by the GAO. In plaintiffs' appeal letter, they argued: (1) plaintiffs' claims filed before June 30, 1994

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[2] The court concluded that some of the plaintiffs employed by the named agencies were exempt from the FLSA's overtime compensation provisions, while others were not. *Id.* Thereafter, in 1994, a partial settlement was reached with the United States as to those employees the court ruled were exempt from the overtime provisions.

[3] The precise text of the statute read:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) for claims filed before June 30, 1994.

should be immediately settled[4] by the GAO, and (2) as for plaintiffs' claims filed after June 30, 1994, they too should be settled since the GAO did not have authority to retroactively shorten the statute of limitations under the Barring Act. Again, allegedly no response was received from the GAO.

During the pendency of the appeal to the GAO, two significant occurrences took place, which make the facts of this is case somewhat byzantine. First, plaintiffs intervened in a related case (*In re Marvin B. Atkinson*, 1996 U.S. Comp. Gen. LEXIS 27 (Jan. 29, 1996) ("*Atkinson* opinion")) in which a U.S. Customs agent brought an FLSA back pay claim before the GAO. The Customs agent's claim was filed January 1st, 1994 – approximately 5 months before section 640's June 30, 1994 cut-off date – and sought six years of FLSA back pay from the government. The GAO, however, decided to withhold its opinion in *Atkinson* because the agency thought Congress would soon once again amend section 640 and thereby potentially render the GAO's decision moot. This, in turn, meant that the agency would refrain from "settling" plaintiffs' similar claims for the same reason.

The second significant occurrence took place on November 19, 1995, when the GAO's decision to withhold the *Atkinson* opinion proved prescient and Congress again amended section 640 as follows:

> This section shall not apply to any claims where the employee has received any compensation for the overtime hours worked during the period covered by the claim under any provision of law . . . or to any claim for compensation for time spent commuting between the employees residence and duty station.[5]

The effect of this Amendment was to further limit plaintiffs' potential recovery. Not only were plaintiffs still restricted to the two year statute of limitations for claims filed after June 30, 1994, but the new amendment also retroactively eliminated plaintiffs' substantive rights under the FLSA to recover overtime pay for time spent commuting or to recover FLSA overtime if they had already received overtime pay under another provision of law.

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[4] The term "settled" is a term of art in this area of law and means "to administratively determine the validity of that claim. . . . Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-6 (1982); *see also Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219, 60 L. Ed. 609, 36 S. Ct. 321 (1916).

[5] When this amendment to section 640 was introduced, Representative Lightfoot made the following statement concerning the need for the amendment: "[t]he problem is that [the unamended statute] will cost as much as $460 million . . . the conferees were faced with a choice – either pay hundreds of millions for work done many years ago . . . or give the Federal workers the same rights as their private sector counterparts . . . . We included language providing for the same treatment of public and private workers . . . not just because it costs a lot of money, but because it is fair." 141 CONG. REC. H12376 (Nov. 15, 1995); *see also Adams*, 154 F.3d 420, 425 (D.C. Cir. 1998).

The some and substance of all of this is that plaintiffs can now be divided into two distinct groups: (1) those who filed their claims *after* June 30, 1994, and therefore, fall under the two or three year limitations period GAO applies to FLSA claims, and (2) those who filed their claims *prior* to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended section 640.

Plaintiffs filed a claim in the District Court for the District of Columbia challenging the constitutionality of section 640 of the 1995 Act, as well as the subsequent amendment to that section, under the Due Process and Takings Clauses of the Fifth Amendment. *Adams v. Bowsher*, 946 F. Supp. 37, 44 (D.D.C. 1996), *aff'd in part, vacated in part, sub nom*., *Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999). Plaintiffs due process arguments were based on the dual premise that retroactive application of both section 640 and the amendment to that section nullified plaintiffs' pending back pay claims and denied them their earned but unpaid FLSA overtime compensation.

The district court concluded that those plaintiffs who filed their claims after June 30, 1994 had no property interest in back pay claims because those claims were not reduced to judgment. *Adams*, 946 F. Supp. at 44. Nor, the district court also concluded, was this group of plaintiffs denied due process because unpaid overtime compensation was not a property interests as defined by the Due Process Clause. *Id.* at 41-42. As to the other category of plaintiffs, those who filed their claims prior to June 30, 1994, the district court concluded that due process was served because the retroactive application of the legislation was furthered by a rational purpose. *Id*. (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).[6]

As for the Takings Clause argument, the district court, applying the three-part test for regulatory takings, denied plaintiffs' claim. *Id.* at 20 (citing *Connally v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-225 (1986)).[7] What weighed heavily against the plaintiffs, according to the trial court, was the lack of a showing that any individual plaintiff would suffer any significant economic detriment and would lose merely "an entitlement that only in recent years had been discovered." *Id.* at 20.

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[6] The district court also denied both plaintiffs' equal protection argument based on the implied equal protection component of the Due Process Clause of the Fifth Amendment (*see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)), as well an Administrative Procedure Act claim primarily challenging the GAO's *Ford* opinion. *Adams*, 946 F. Supp. at 22-26.

[7] "[T]he Supreme Court identified the following three factors: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered "with distinct investment-backed expectations, and (3) the character of the government action." *Adams*, 946 F. Supp. at 19-22. It is interesting to note that the district court in applying this balancing test for regulatory takings, merely assumed, but never analyzed, the existence of a property interest cognizable under the Takings Clause.

On appeal, the D.C. Circuit essentially affirmed the district court's due process, equal protection, and statutory analysis. *Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998) (per curium). The court held that regardless of whether plaintiffs' possessed a property interest in either the pending administrative claims or the overtime back pay, any hypothetical property interest was properly extinguished because the retroactive economic legislation, that is, the amendment to section 640, had a legitimate legislative purpose and was furthered by rational means. *Id.* at 424-425. Accordingly, the court never reached the issue of whether plaintiffs' alleged property interest was cognizable under the Due Process Clause.

As to the takings claim, the court held that the district court lacked jurisdiction because the Tucker Act, 28 U.S.C. § 1491(a)(1), confers on the Court of Federal Claims exclusive jurisdiction over takings claims above $10,000. *Id.* at 425-426. Consequently, the appellate court remanded the takings claim to the district court with orders to transfer the case here.

As a result, plaintiffs filed the present complaint alleging that three separate actions effected a taking under the Fifth Amendment: (1) the GAO's *Ford* decision that retroactively limited the statute of limitations for administrative claims to two years, (2) the GAO's decision to withhold "settlement" on those of plaintiffs' claims filed before June 30, 1994 during the pendency of the *Atkinson* decision, and (3) Congress' amendment of section 640 which limited overtime and commuting compensation.

Defendant moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Court of Federal Claims (RCFC). Oral argument was heard on April 28, 2003, in Washington, D.C. Further supplemental briefing was requested by plaintiffs and granted by the court. Thereafter, plaintiffs also sought permission to file supplemental authority, which was also granted by the court.

II. Discussion

A. Standard of Review

RCFC 12(b)(6) mandates dismissal of a case where the plaintiff fails to state a claim upon which relief can be granted. When faced with a Rule 12(b)(6) motion, the court should grant the motion only if "it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); *Consolidated Edison Co. v. O'Leary*, 117 F.3d 538, 542 (Fed. Cir. 1997), *cert. denied sub nom. Consolidated Edison Co. v. Pena*, 522 U.S. 1108, 140 L. Ed. 2d 103, 118 S. Ct. 1036 (1998). The facts must be viewed in a light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

RCFC 12(b)(1) directs dismissal when the court lacks jurisdiction over the subject matter of the case. When deciding on a motion to dismiss based on lack of subject matter jurisdiction, much like a Rule 12(b)(6) motion, this court must assume that all undisputed facts alleged in the complaint

are true and must draw all reasonable inferences in the non-movant's favor. *E.g., Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Ho v. United States*, 49 Fed. Cl. 96, 100 (2001), *aff'd,* 30 Fed. Appx. 964 (Fed. Cir. 2002).

Conversely, unlike a Rule 12(b)(6) motion, when hearing a motion under Rule 12(b)(1), the court can consider matters outside the pleadings. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994) ("[i]n establishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits' and deposition testimony"). Furthermore, unlike a Rule 12(b)(6) motion, a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), may be raised by the court *sua sponte* at any time. *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998) (quoting *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993), *reh'g denied* (1993)).

B. Are Statutory "Earned" Overtime Payments Property?

Defendant essentially makes two arguments, only the latter of which is really determinative. The first is that plaintiffs' case is really an FLSA case disguised in Fifth Amendment rubric. This is so, defendant argues, because the property allegedly taken and the damages resulting therefrom are plaintiffs' FLSA overtime payments. As such, the claim is in essence one for statutory entitlement under the FLSA and, regardless of what the disputed time limitations period should have been for plaintiffs' administrative claims, the claim before this court is time barred under the two year limitations period for FLSA claims in the Court of Federal Claims under 29 U.S.C. § 255(a).[8] Defendant's second argument, which when reformulated as a question presents the core issue in this case, is that plaintiffs' FLSA overtime payments do not constitute property within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution.[9]

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[8] This provision provides that:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.] ....
> (a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued...

The defendant correctly notes that this limitations provision constitutes a waiver of sovereign immunity. *See Saraco v. United States*, 61 F.3d 863, 865-866 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996).

[9] Defendant also asserts that this case is barred under the doctrine of collateral estoppel, or issue preclusion, since the issues presented were decided by the D.C. Circuit in the preceding litigation. This court rejects that argument, however, under a well established exception to collateral estoppel

Nevertheless, the court believes defendant's arguments are topsy-turvy, for only if unpaid statutorily mandated overtime does not constitute property within the meaning of the Fifth Amendment's Takings Clause, is plaintiffs' claim one solely under the FLSA. If this is so, then indeed plaintiffs' hypothetical FLSA claim might very well be time barred. Thus, the issue squarely before the court involves the definition of property under the Takings Clause of the Constitution's Fifth Amendment.

As Judge Plager of the Federal Circuit observed: "A man's home may be his castle, but that does not keep the Government from taking it. As an incident to its sovereignty, the Government has the authority to take private property for a public purpose." *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). The Takings Clause of the Fifth Amendment, however, prohibits the government from "taking property for public use" unless it provides "just compensation." U.S. CONST. amend. V. What constitutes property is the initial determination triggering application of the Takings Clause to a claim. Indeed, the Federal Circuit explicitly requires defining the relevant property interest as the first of a two-step approach to takings claims. "'First, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, *i.e.*, whether the plaintiff possessed a 'stick in the bundle of property rights.'" *Boise Cascade Corporation v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002) (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (internal citation omitted)). If so, "the court proceeds to the second step, determining 'whether the governmental action at issue constituted a taking of that 'stick.'" *Id.* (quoting *Karuk Tribe of Cal*. 209 F. 3d at 1374).

Concerning step one, defendant contends that plaintiffs' claim must fail because the claim is for money and that money does not constitute property within the Fifth Amendment's Takings Clause, citing *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 37-42 (2000). Def's Mot. to Dismiss at 14. Plaintiffs respond with a plethora of arguments, employing a shotgun approach with the hope that one may very well hit the target.

Plaintiffs' first shot is to distinguish *Commonwealth Edison Co.* as a case involving a government imposed payment, while plaintiffs claim involves an unlawful taking of labor, and that *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55 (2nd Cir. 1984) establishes that the U.S. Department of Labor recognizes this precept. Tr. at 49-52; Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss at 22. Plaintiffs' second blast is the contention that their claim falls under the Supreme Court's holdings in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), *United States v. Larinoff*, 431 U.S. 864 (1977), *Armstrong v. United States*, 364 U.S. 40 (1960), and, more

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that blocks the doctrine's applicability where the party against whom preclusion is sought could not, as a matter of law, have raised the issue in the prior litigation. Since this court has exclusive jurisdiction over takings claims above $10,000, neither the D.C. District Court nor the D.C. Circuit would have jurisdiction over plaintiffs' claims. As a result, plaintiffs could not, as a matter of law, have raised their takings claims in the prior litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (noting that collateral estoppel is inappropriate where "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"); *See also Golden Pac. Bank Corp v. United States*, 15 F.3d 1066, 1073-1074 (Fed. Cir.), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994).

recently, *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). *Id*. at 27; Pl.'s Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 1-4. As explained below, all these arguments misfire. Plaintiffs' last shot is the argument that the retroactive abolition of plaintiffs' overtime payments really is akin to a taking of a cause-of-action securing either a property interest or a right recognized by law. Pl.'s Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. This argument misses the mark *and* the target.

In *Commonwealth Edison Co.*, the primary issue was the constitutionality under the Fifth Amendment's Due Process and Takings Clauses of the Energy Policy Act of 1992 which imposed a monetary assessment on domestic utilities for the remediation of the government's uranium enrichment facilities operated by the U.S. Department of Energy. *See* 42 U.S.C. § 2297g *et seq.* (2002). This court concluded that the imposition of the special assessment was an obligation to pay money, which did not constitute a protected property interest for Takings Clause purposes. *Commonwealth Edison Co.*, 46 Fed. Cl. at 37-42. The court also rejected the due process exaction arguments. *Id.* at 45. Because of the many companion cases pending in the Court of Federal Claims, the Federal Circuit after oral argument *sua sponte* determined to decide the case *en banc*. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001).

In upholding the trial court, the Federal Circuit held that an obligation to pay money is not a protected property interest under the Takings Clause. In so holding, the court relied upon the view of the majority of justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In this case the Supreme Court confronted the constitutionality of the retroactive liability provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* (2002) ("Coal Act"). The Coal Act required certain coal operators to fund future health benefits of current and former coal mine employees.

The Federal Circuit noted that a plurality of the Supreme Court concluded that the retroactive impact of the Coal Act resulted in an unconstitutional taking of property because it placed a "severe, disproportionate and extremely retroactive burden" on various coal operators such as Eastern. *Id* at 1336 (quoting *Eastern Enters.*, 524 U.S. at 538 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, J.J.)). But the Federal Circuit also observed that five justices rejected the theory that an obligation to pay money constitutes a taking because such an obligation is not the same thing as a taking of a discreet property interest.[10] *Id*. at 1339. "Thus five justices of

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[10] In his concurring opinion, Justice Kennedy disagreed with the plurality's conclusion that the Coal Act resulted in an unconstitutional taking of property because while the Coal Act may impose a staggering financial burden on the petitioner:

> it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority." *Id*. (citing several sister circuits for the same proposition: *Parella v. Ret. Bd. of the R.I. Employees' Retirement Sys*., 173 F.3d 46, 58 (1st Cir. 1999); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3rd Cir.), *cert. denied*, 528 U.S. 963, 120 S. Ct. 396 (1999); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117, 120 S. Ct. 936 (2000)).

Indeed, prior to the plurality's decision in *Eastern Enterprises*, it was well-accepted that an obligation to pay money does not constitute a taking. *See, e.g.*, *United States v. Sperry Corp.*, 493 U.S. 52, 6 n.9, 110 S. Ct. 387 (1989) (holding that a federal statute requiring the payment of a portion of an arbitral award from the Iran-United States Claim Tribunal to the United States government did not violate the Takings Clause because, in part, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible"); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir.), *cert. denied*, 498 U.S. 811, 111 S. Ct. 46 (1990) (holding that Uranium Mill Tailings Radiation Control Act's requirement that uranium producers spend large sums to clean up uranium tailings piles did not constitute an unconstitutional taking of property under the Takings Clause because there is no allegation "of a physical taking of any of its property. . . . [Uranium producer] alleges only that it will be required to spend sums of money for reclamation of tailings and mill decommissioning").

One distinction, this court notes, is that every one of these "obligation to pay" cases involves private parties' obligation to pay pursuant to either a federal statute or regulation, whereas the case at bar is the very reverse – it is the government that is alleged to have an obligation to pay money (here FLSA alleged "earned" overtime to multiple private parties). Yet this is a distinction without a difference. The analysis turns on the identification of a discreet property interest. All the plaintiffs have identified is a run-of-the-mill claim for liability. As the Federal Circuit in *Commonwealth Edison Co.* put it: "[W]hile a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co.*, 271 F.3d at 1340.

This conclusion by the Federal Circuit that a specific fund of money need be the subject of a takings claim naturally leads to consideration of plaintiffs' argument that such Supreme Court cases as *Webb's Fabulous Pharmacies*, *Armstrong* , and the recent *Brown* decision, support their cause. Far from helping plaintiffs, however, these precedents are wholly consistent with *Commonwealth Edison Co.* because they involve either specific sums of money or discreet property interests recognized under state or common law. *See Brown v. Legal Foundation of Washington*,

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Eastern Enters., 524 U.S. at 540. In dissent, Justices Stevens, Souter, Ginsberg, and Breyer similarly agreed that the case did not fall within the protection of the Takings Clause because "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money. . . ." *Id*. at 554 (Stevens, Souter, Ginbsurg, and Breyer, J.J., dissenting).

123 S. Ct. 1406 (2003) (holding that a state law requiring interest from IOLTA account be transferred to a different owner for public use could be a *per se* taking requiring the payment of just compensation to the owner); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S. Ct. 446 (1980) (holding that the Takings Clause applies to monetary interest generated from the operation of a specific, separately identifiable fund of money); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (holding that a materialmen's lien provided under state law was a "compensable property interest within the meaning of the Fifth Amendment"). *See also Phillips v. Washington Legal Found.*, 524 U.S. 156, 160, 118 S. Ct. 1925 (1998) (holding that interest on income generated by funds held in IOLTA accounts is private property of the owner for purposes of the Takings Clause).

The court must emphasize what is and what is not involved in plaintiffs' claim. Plaintiffs are not complaining that they were not paid wages for their labor, which might hypothetically state a claim for breach of an employment agreement. They do not allege that they were not paid for overtime work. *See* Federal Employee Pay Act, 5 U.S.C. § 5541 *et seq*. (2002). What they do complain of is that they are owed money for overtime for an amount that need be calculated under the FLSA before it was amended by Congress.

This is either a standard claim for money under the FLSA or a due process claim challenging retroactive application of the amendment. However, it is not a Takings Claim under the Fifth Amendment, for even if an obligation to pay money can be considered property, no property was here seized for public use. In other words, nothing was really "taken" from plaintiffs for the of the public – at best, proceeds simply were not paid. *See Connolly v. Pension Benefit Guaranty Corp*., 475 U.S. 211, 224 (1986) (holding that there can be no compensation under the Takings Clause if "the United States has taken nothing for its own use").

Accordingly, the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs FLSA overtime because it believed plaintiffs' exempt, a conclusion buttressed by the D.C. Circuit. *See Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999). Indeed, for courts to rule otherwise in cases like this one would elevate ordinary claims for monies owed by government into constitutional cases. And this court agrees with defendant that to so rule would also produce absurd semantic results. *See Branch v. United States*, 69 F.3d 1571, 1575-1576 (Fed. Cir. 1995) ("To be sure, analyzing the assessment under the principles of takings law is awkward . . . because the property allegedly taken in this case was money [which] leads to the curious conclusion that the government may take the bank's money as long as it pays the money back"). When cash payments are solely involved, it is strained to talk about cash for cash as compensation when it is really a kind of replevin or debt payment.

Plaintiffs' initial defense – that what is at stake here is not an obligation to pay earned overtime, but rather labor taken by the government – is likewise unconvincing. The primary case plaintiffs cite for the proposition that labor is in-and-of-itself property, *Donovan v. Sovereign Security, Ltd.,* 726 F.2d 55 (2nd Cir. 1984), says nothing of the kind. *Donovan* clearly is not a takings case, but a statutory FLSA case for pre- and post-judgment interest on wrongfully withheld overtime compensation by a private employer. All that was at stake in this case was at best a statutory right.

Also unpersuasive is plaintiffs subsequent argument that *Donovan* falls under the Supreme Court's holding in *Brown* because in both these cases the amount of interest owed was ascertainable. Pl.'s Supplemental Br. at 2-3. First, this misconstrues *Brown*, which held that transfer of interest to a *non-owner* of a specific IOLTA account was a taking. Unlike *Brown*, *Donovan* dealt with interest owed on a judgment not yet paid to the claimed *owner*. Second, *Donovan* is a mere liability case. The fact that the amount or type of damages sought in a claim is ascertainable does not transform it into a property right, nor elevate what is an ordinary action for money into a constitutional case.

Be that as it may, how one interprets *Donovan* is here largely academic. Plaintiffs may not at this late date raise novel theories.[11] It is not in their complaint, which instead refers to the alleged

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[11] For instance, plaintiffs also argue that the proposition that labor is a property is supported by none other than James Madison himself, the author of the Bill of Rights, of which the Fifth Amendment is, of course, a component. Pl.'s Supplemental Br. at 1. Plaintiffs quote from an article in the Spring/Summer 1990 edition of the *Cato Journal*, which, in turn, selectively quotes from James Madison's famous *Essay on Property*. Plaintiffs are perhaps correct in concluding that James Madison's definition of property in his famous essay (first published in the March 27, 1792 edition of *The National Gazette*) might be wide enough to encompass their labor-is-property postulate:

> This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

James Madison, *Essay of Property*, reprinted in Kurland, *The Founders' Constitution*, Vol. 1, Ch. 16, Document 23, University of Chicago Press (1987) (emphasis original, original spelling). One can readily see that Madison recognizes that his definition is broader than that of the common law and Blackstone's, which is quoted in the first sentence in this excerpt. The essay reveals that Mr. Madison's definition of property includes such ideas as freedom of conscience and religion, precepts we today typically associate with the First Amendment. Madison's ideas certainly had an immense impact on the founding generation and on posterity, but his philosophy should not be confused with "*the law*." This court is bound by precedent and other law – not by a particular political creed – no matter how personally persuasive it is to the court. Indeed, James Madison, who along with Alexander Hamilton and John Jay authored *The Federalist Papers* under the pseudonym *Publius*, likely would approve. *See* THE FEDERALIST NO. 78 ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.... The courts must declare the sense of the law....")(Alexander Hamilton).

property interest taken as "duly earned wages." Compl. at ¶¶ 40-45.

Finally, plaintiffs' multitude of other cases cited to support the proposition that statutorily earned overtime payments are property requiring compensation under the Takings Clause are either inapplicable[12] or inapposite. *United States v. Larinoff*, 431 U.S. 864 (1977) is the prime example of the latter. In this case, the Supreme Court struck down the retroactive elimination of a military re-enlistment bonus. A serviceman had enlisted in a special military program which trained personnel in communications technology. Because this specialized training was in short supply, the military offered Mr. Larinoff a bonus if he agreed to extend his service beyond the original enlistment period. Larinoff agreed to this "re-enlistment," however, during the time of his service Congress retroactively eliminated the bonus. The Court held that Larinoff was entitled to the bonus at the time he originally enlisted since it was at that time that he agreed to extend his service through the re-enlistment agreement.

Plaintiffs in the case at bar claim *Larionoff* applies because their right to the FLSA overtime "vested" – as plaintiffs term it – at the end of each pay period, and therefore, Congress could not retroactively eliminate plaintiffs' entitlement to that payment. Nevertheless, *Larionoff* is not a constitutional takings case establishing the existence of a property interest. Instead, it is a case of statutory interpretation establishing the right to an entitlement.[13] *Larionoff*, 431 U.S. at 2154 ("Both

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[12] Among other of plaintiffs' sundry cases cited for support are: *Cienega Gardens v. United States*, 2003 WL 21356416 (Fed. Cir. 2003); *Gonzales v. United States*, 275 F.3d 1340 (Fed. Cir. 2001); *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992); *National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714 (Fed. Cir. 1998); and *PI Electronics Corporation v. United States*, 55 Fed. Cl. 279 (2003). What each of these cases have in common is that they have little or nothing in common with the precise issue in this case. The court will address only those cited authorities where such citation adds a colorable argument to the controversy *sub judice*.

[13] Generally, entitlements are government conferred benefits safeguarded by procedural due process; for a claim for entitlement to be considered legitimate, it must be based on something more than a unilateral expectation. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Traditionally, whether property was protected as such was determined by whether it was a right or a privilege. *See Barsky v. Board of Regents*, 347 U.S. 442, 451, 74 S. Ct. 650, 655-656 (1954) (noting that the right-privilege distinction is between common law property and state largess such as attendance in state universities). With the growth of government benefits, the distinction between rights and privileges broke down. *See generally* Reich, *The New Property*, 73 Yale L. J. 733 (1964) (certain government benefits which do not fall under traditional notions of property ought to have some protection against arbitrary government action). Towards the last decades of the Twentieth Century, the Supreme Court began to apply procedural due process to various benefits to safeguard against unfairness. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding AFDC welfare payments were considered "entitlements" deserving Fifth Amendment due process protection) (citing Reich, at 1017 n. 8).

The Supreme Court appears now to require protection for only those discreet interests encompassing life, liberty or property contained in the Due Process Clause. *See Lawrence v. Texas*, 123 S. Ct. 2472 156 L. Ed. 2d 508 2003 U.S. LEXIS 5013 (holding that the precept of liberty

the Government and respondents recognize that [a] 'soldier's entitlement to pay is dependent upon statutory right,' and that accordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the [program], rather than to ordinary contract principles.") (citing *Bell v. United States*, 366 U.S. 393, 401, 81 S. Ct. 1230, 1235 (1961)).

Plaintiffs similarly cite *Zucker v. United States*, 758 F.2d 637 (Fed. Cir. 1985), for the proposition that their expectation of FLSA overtime payments is a property right. But their effort fails because, like *Larionoff*, *Zucker* is in essence a statutory entitlement case and not a Fifth Amendment takings case. In *Zucker*, the Federal Circuit held that a congressional amendment to the Civil Service Retirement Act which decreased the cost-of-living adjustments (COLA) for retirees did not violate procedural due process because retirement benefits were legitimately subject to change and, therefore, could not be considered an entitlement. *Zucker*, 758 F.2d at 639-640. In so holding, the court's analysis revolved around whether the applicable COLA was a statutory entitlement. *Id*. at 639 ("To have a property interest in a benefit protected by procedural due process, a person must have a legitimate claim of entitlement to the benefit.") (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972)). It is significant that the court rejected a takings argument in this context because COLA increases were statutory and not contractual in nature.[14] *Id.* at 640.

The confusion for plaintiffs lies in that *Zucker* uses the term "property interest" interchangeably with the more accurate description "entitlement." But what may be a statutorily created entitlement or "property interest" in a Due Process Clause context may or may not neatly fit into Takings Clause analysis, as *Zucker* amply demonstrates. This court, however, need not reach this issue, for under the facts of the case *sub judice*, plaintiffs' claim falls under neither.

At its heart, plaintiffs' claim really is a challenge to retroactive legislation that allegedly illicitly diminished plaintiffs' then existing statutory benefits. The crux of plaintiffs' claim is therefore that the amendments to section 640 are unlawful. As a general proposition: "Such a holding,

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historically encompasses the protection of intimacy in the bedroom); *Roth*, 408 U.S. at 577 (holding that entitlements can not be a mere expectancy to qualify for due process protection as something akin to a statutorily created property interest). This has been interpreted as a partial return to the old right-privilege distinction. *See* Smolla, *The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); *Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Cal. L. Rev. 1044 (1984). *See generally* R. Rotunda and J. Nowak, 3 Treatise on Constitutional law: Substance and Procedure (3rd ed. 1999) at 6-7.

14 A problem raised before, yet not addressed by, the *Zucker* court is where a statutory program creates *both* an "entitlement" and a cognizable property interest protected under the Takings Clause of the Fifth Amendment. This may conceivably occur when the statutory program calls for, or in essence creates, a contractual relationship defined as property by common law or state law. A breach of the contract could give rise to a takings clause violation. *See Ruckelshouse v. Monsanto Co*, 467 U.S. 986 (1984). But, the property interest must be separate and distinct from any rights conferred by contract. *Prudential Insurance Co. v. United States*, 801 F. 2d 1295, 1300 n.13 (Fed. Cir. 1986).

however, cannot properly derive from the Takings Clause, which is not prohibitory, but rather compensatory in nature." *Commonwealth Edison Co.*, 46 Fed. Cl. at 41-42 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315, 107 S. Ct. 2378 (1987) ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") (emphasis in original) (citations omitted). Consequently, plaintiffs' claim does not fall under the safeguard of the Takings Clause, but is at best a due process claim to secure an alleged entitlement – a claim heretofore rejected by the D.C. Circuit in *Adams v. Hinchman*.

C. Did the Retroactive Amendments to Section 640 Amount to an Unconstitutional Taking of a "Cause-of-Action" or "Right"?

Almost as an afterthought, plaintiffs present an alternative theory for recovery under the Takings Clause based on the premise that what was taken from them was a cause-of-action to protect property or another legal right. It is not all together clear what this argument entails. There are two possibilities.

The first is predicated on the fact that in the present action plaintiffs are seeking to vindicate both their "claims to FLSA back wages" and their "statutory rights . . . under the FLSA." Pl.'s. Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. Citing *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481-1482 (Fed. Cir. 1994), and *Hodel v. Irving*, 481 U.S. 704 (1987) plaintiffs correctly establish that the Takings Clause requires compensation for a taking of a cause-of-action to sue to protect a legal right, such as real property (*Alliance*), or an appropriation of a right protected by law, such as the common law right of descent and devise (*Hodel*). Plaintiffs go on to equate these two rules of law with their own cause by contending that "in the instant case, plaintiffs have been deprived not merely of their FLSA pay, which the Government has withheld for their own use, but also of [both] their statutory rights thereto under [the] FLSA" (*Id.* at 10), as well as their right to vindicate "plaintiffs' claims to FLSA back wages" (*id.* at 9 (emphasis original)).

But these contentions are fatally flawed. As to the latter two, those are legal conclusions that either were rejected by the D.C. District Court and D.C. Circuit, or belied by the salient fact that plaintiffs were able to prosecute actions to protect their constitutional, statutory and administrative rights in those fora. As to the former, that is a contention rejected by this court in the prior section of this opinion. In reality, plaintiffs are attempting to shoehorn their spurned argument that an obligation to pay overtime is a property right into the rhetoric of *Alliance* and *Hodel*. It simply does not fit.

However, perhaps – it is not clear – plaintiffs are arguing a second scenario: that because the retroactive amendment to section 640 shortened the statute of limitations period in which to vindicate FLSA statutory rights, for at least the discreet period of time lost, a cause-of-action protecting a federal statutory entitlement was unconstitutionally extinguished. But even this somewhat more sophisticated argument must fail for essentially the same reasons as did the prior one. While it is true

that in certain circumstances abolition of a cause-of-action can rise to a level of an unconstitutional taking (*see Cities Servs. Co. v. McGrath*, 342 U.S. 330, 72 S. Ct. 334 (1952); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)), it is equally true that plaintiffs' cause-of-action must secure a cognizable "legally protected interest." *See United States v. Willow River Power Co.*, 324 U.S. 499, 503, 65 S. Ct. 761, 764 (1945). Plaintiffs have two fundamental problems in that regard. The first, as explained above, is that their claim for overtime payment is not cognizable as a property right protected by the Takings Clause. The second, is that the D.C. District Court and the D.C. Circuit on appeal upheld the legality of Congress' retroactive amendment to section 640, and rejected plaintiffs' other constitutional, as well as, statutory and Administrative Procedure Act claims.

Thus, no matter how one looks at it, no claim, in other words, no cause-of-action, to protect plaintiffs' rights has been unconstitutionally taken from them. To be sure, plaintiffs in this case are not really complaining about a taking of a specie of property. What they are in reality seeking to safeguard is a statutory grant of largesse from revocation by Congress. Such a claim more properly falls under the rubric of due process of law, a claim over which this court has no jurisdiction and which plaintiffs previously and unsuccessfully prosecuted in the D.C. District Court and the D.C. Circuit Court of Appeals.

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss is **GRANTED**. The Clerk of the Court is hereby **ORDERED** to enter final judgment in favor of defendant.

NO COSTS.

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Lawrence J. Block
Judge